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BOOK REVIEWS.

THE RULE AGAINST PERPETUITIES. BY JOHN C. GRAY. Second Edition. Boston, 1906.

In looking over the second edition of Professor Gray's valuable, or rather invaluable, work on the rule against perpetuities, the first and obvious thought is that it is not possible in the second edition of any scientific work to do much more than supplement the original edition with such additional light as has been shed upon the problems involved since the date of the first edition. No reader of Mr. Gray's work needs to be reminded of the fact that it created an epoch in the study of the subject; what had before his time been treated as a more or less mysterious principle of more or less difficult application, was placed by him upon a simple

and scientific basis, so that he could argue with a good deal of force that the application of his principle was susceptible of almost mathematical accuracy. It was this underlying thought in his work that distinguished it from any of the other essays upon the same subject. Inasmuch as many of the courts had not proceeded upon the principle as he expounded it, it is certainly a matter of interest to inquire how far his views have been effective in bringing about the establishment of the principles for which he contended.

Looking at his second edition from this point of view, we find that it is conveniently arranged under the same section numbers, the new matter in the body of the book being grouped under sub-sections. For example, to section 214, which is identical with section 214 in the first edition, there are added five new sections, numbered from 214 a to 214 e inclusive, in which the original doctrine of 214 is amplified, and some recent cases upon the point are cited and discussed. Incidentally it may be remarked that substantially the whole of the original text has been used in its original form; the only omission that has been noted is that the original section 122 has been omitted altogether. It may be also worth noting that Mr. Gray has apparently not yet abandoned his investigation among the old cases. For example, sections 141 a to 141 f inclusive of the new edition are devoted to a discussion of the cases in the sixteenth century which throw additional light on the meaning of the word "perpetuities" to the older judges.

Among the more interesting insertions in the second edition are the following:

First, sections 214 a to 214 e inclusive, in which recent cases in Massachusetts and Connecticut are cited as bearing upon Gray's proposition that the contingency *must* happen, if at all, within the required limits. Applying his own proposition to these cases, he arrives at the conclusion that the Massachusetts case was accurately decided, but suggests a very strong query as to the Connecticut decision.

Secondly, in sections 245 c to 245 e inclusive, he summarizes the principal Maryland decisions in which, as in Massachusetts and some other states, life estates and equitable fees had been, as he maintains, inaccurately held to violate the rule. After pointing out the apparent violation, and his own hope that the court will see the error, as other courts quoted by him had done, he adds in section 245 e that his hope has been realized by a recent decision (1904) in which, as he thinks, the prior decisions have been tacitly overruled.

Apparently, Mr. Gray has not yet ceased to study with interest the Pennsylvania decisions. Those familiar with his

book will not easily forget the strong language in which some of them, as for instance, *Smith's Appeal*, 88 Pa., had been criticized by him. In section 249 b of his second edition he takes another fling at the Supreme Court of Pennsylvania, and criticises the ruling in *Johnston's Estate*, 185 Pa. 179. One may recognize frankly that in many branches of the law text-book criticisms are entitled to comparatively little weight. They are often made by unpractical and theoretical writers who do not feel the influence of the practical considerations which properly affect the minds of judges. In such a branch of the law, however, as that covered by the rule against perpetuities, the contrary is the case. With due respect, it is believed that the decision referred to was made, not because the court disagreed with Mr. Gray's contention, but because the contention was not called to their attention. In other words, it may perhaps be properly said that in modern times the lawyer's education is not directed largely to questions that are considered as antiquated as the rule against perpetuities. Hence it follows that when in practice a case involving this rule comes before the court it is treated, not as one involving an important principle with which the courts are familiar, and in which they are interested, but as one to be disposed of with as little ceremony as may be, upon the basis of any prior decisions which apparently apply to it, without much reference to the desirability of following any single underlying principle. Recent decisions seem to indicate that this disposition is still evident in the decisions of the courts in spite of the effort which Mr. Gray has made to clear up the subject.

Thirdly, Mr. Gray was apparently more interested in exploding the old theory about "a possibility upon a possibility" than any of the other mistakes which he found in the law on the subject. Hence, it must have been a severe disappointment to him when in *Whitby* v. *Mitchell* and *In re Frost*, the Court of Appeals in England upheld the older, and as he claimed unsound, rule. He must have felt as disappointed as when the courts of many states upheld spendthrifts' trusts after in his work on "Restraints on Alienation" he had so confidently denounced them. It looks, however, as if he may be entitled to better luck this time, as in the addenda on page 46 of the introduction he points out that in the recent case of *In re Ashforth* (1905), the court dissented from the dictum of Judge Kay *In re Frost* in favor of the "possibility upon a possibility." Certainly Mr. Gray has not been swerved from his original opinion either by the recent English decisions or the criticisms on the same which he discusses fully in his text.

Fourthly, that Mr. Gray, however, is not unwilling to be convinced, is shown by section 603 a of the second edition in which he frankly admits some doubt as to the principles laid down by him in the first edition with regard to the application of the rule to "charitable trusts."

As intimated at the outset, it would not be reasonable to look in the second edition for a repetition of the new and startling ideas contained in the first edition. Mr. Gray has, however, still been thinking on the questions involved, with the result that in the appendix to the second edition, under the letters from *e* to *i* inclusive, he has added what are in effect five new essays on the subject. These contain some new and very interesting ideas which compare favorably with the unusual ideas of which his first edition is so full. For instance, in section *e* of the appendix he discusses at length the recent criticisms on his opinion, as expressed in his second chapter, as to the effect of the statute of "Quia Emptores" on the possibility of creating determinable fees. He does not retract his original opinion, but in section *e* furnishes some additional reasons in support thereof. In this connection he cannot fail to grasp the opportunity of discussing a line of cases, of which *Doe* v. *Eyre* is the most conspicuous illustration, as to the effect upon the prior devise of the failure for any reason of an executory gift. This line of cases seems to the writer to present one of the most interesting questions of the principles of the law of executory devises that still remain partly unsettled by the courts. Mr. Gray, after criticising with much force the English decisions upon the point, finds in them some additional support for his theory as to the effect of the statute of Quia Emptores.

Similarly in section *f* of the appendix he discusses more fully the law of future interests in personal property,—apparently on the theory that it is easier to discuss it in this form than to modify and rewrite the original text upon the subject.

Upon the whole book it may properly be said that, if it is not as startling as the first edition, nevertheless it presents additional evidence of the author's resolve to inspire new life into his subject. It may be honestly doubted whether in these modern days any book on the subject of real property is likely to be written in which an apparently old subject will be given new life and new interest and new practical value in the way in which Professor Gray has in his work "reviewed" the rule against perpetuities. In its way, it is not only a classic of the law, but the classic of the modern law on the subject of real property.

R. D. B.